

No. 11171

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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KENTON GEORGE SCHULTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

FEB 14 1946

PAUL P. O'BRIEN,  
CLERK



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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

### Appeal:

Certificate of Clerk to Transcript of Record on .....	12
Notice of .....	10
Statement of Matters Upon Which Appellant Intends to Rely and Stipulation as to Record on .....	14
Statement of Points and Designation of Record on .....	15

Assignment of Errors .....	12
----------------------------	----

Certificate of Clerk to Transcript of Record on Appeal .....	12
--	----

Indictment .....	2
------------------	---

Judgment and Commitment .....	9
-------------------------------	---

Minute Order, Oct. 9, 1945—Motion in Arrest of Judgment Denied .....	8
--	---

Motion in Arrest of Judgment .....	4
------------------------------------	---

Names and Addresses of Attorneys .....	1
--	---

Notice of Appeal .....	10
------------------------	----

Statement of Matters Upon Which Appellant Intends to Rely and Stipulation as to Record on Appeal .....	14
--	----

Statement of Points to be Relied On, and Designation of the Record .....	15
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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PEARCE, CAMPBELL, BRYAN & NORCOP

MAURICE NORCOP

1010 Pershing Square Bldg.

448 S. Hill St.

Los Angeles 13, Calif.

For Appellee:

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant U. S. Attorney,

MILDRED L. KLUCKHOHN,

Assistant U. S. Attorney,

600 U. S. Post Office & Court House

Building,

Los Angeles 12, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for  
the Southern District of California, Northern  
Division

No. 2624

April, 1945, Term

THE UNITED STATES OF AMERICA,

vs.

KENTON GEORGE SCHULTZ,

Viol.: United States Code, Title 50, Appendix, Sec-  
tion 311 Selective Training and Service Act  
of 1940

### INDICTMENT

In the Name and by the Authority of the United States of America, the Grand Jury for the Southern District of California, at Los Angeles, presents on oath in open court:

That Kenton George Schultz, hereinafter called the defendant, is a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended; that defendant registered as required by said Act and the rules and regulations promulgated thereunder and became a registrant of Local Board No. 129, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Kings, State of California, in the division and district aforesaid; that pursuant to the terms and provisions of said Act and the rules and regulations promulgated thereunder, said defendant was classified in Class I-A and was subsequently notified of said classification by said board, and a

notice and order by said board was thereafter duly given to said defendant to report for induction into the armed forces of the United States of America on December 27, 1943, at Hanford, Kings County, California, within the division and district aforesaid; that said defendant did at said time and place knowingly and unlawfully fail and neglect to perform a duty required of him under said Act and the rules and regulations promulgated thereunder, that is to say, the defendant did then and there knowingly and unlawfully fail and neglect to report for induction into the armed forces of the United States, as so notified and ordered to do;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [2]

#### COUNT TWO

And the Grand Jury aforesaid, upon its oath aforesaid, does further present:

That Kenton George Schultz, hereinafter called the defendant, is a male person within the class made subject to selective service under the Selective Training and Service Act of 1940; that defendant registered on October 16, 1940, as required by said act and the rules and regulations promulgated thereunder, and thereupon became a registrant of Local Board No. 129, said board being then and there duly created and acting under the Selective Service System, established by said act, in the County of Kings, State of California, within the division and district aforesaid; that from on or about September 16, 1943, and at all times thereafter, at Hanford, Kings

County, California, within the division and district aforesaid; the said defendant did knowingly fail and neglect to perform a duty required of him under said act and the rules and regulations promulgated thereunder, in that he did then and there knowingly fail and neglect to keep said Local Board No. 129 advised of the address where mail would reach him;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) CHARLES H. CARR

United States Attorney

[Endorsed]: Filed July 11, 1945. [3]

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[Title of District Court and Cause.]

#### MOTION IN ARREST OF JUDGMENT

Comes now Kenton George Schultz, the defendant in the above entitled cause and now moves that the verdict of guilty returned against him by a jury in this Court upon the 10th day of October A. D. 1945, be arrested and no judgment and sentence be imposed thereon for the following reasons:

1. That the indictment upon which the defendant was tried and convicted does not state facts sufficient to constitute a crime against the United States.

2. That the First Count of the indictment to which the defendant entered his plea of not guilty

and which was thereafter, over the objection and exception of the defendant, dismissed [6] by the Court prior to the commencement of the trial, does not state facts sufficient to constitute a crime against the United States.

3. That the Second Count of the indictment upon which the defendant was actually tried and convicted does not state facts therein sufficient to constitute a crime against the United States.

4. That the Second Count of the indictment upon which the defendant was actually tried and convicted states facts which might possibly be sufficient to constitute a misdemeanor if it constitutes any crime at all against the United States, whereas the Statute requires that all violations thereof be pleaded as felonies and they are felonies if any crimes at all.

5. That the Second Count of the indictment in which the defendant was accused and was tried and convicted, fails to state facts sufficient to constitute a felony crime against the United States.

Dated this 12th day of October, 1945.

PEARCE, CAMPBELL, BRYAN  
& NORCOP,

By MAURICE NORCOP

Attorneys for Defendant.

## AUTHORITIES IN SUPPORT OF MOTION

“The general rule is that the term ‘wilfully’ cannot be omitted from an indictment when the term is part of a statutory definition.”

Wharton’s Criminal Procedure (10th Ed.)  
Vol. 1. Secs. 285 and 318.

Rumley v. United States 293 Fed. 532 at  
p 547. [7]

\* \* \* “The indictments charged in part that these defendants well knowing the premises aforesaid, unlawfully did ‘knowingly’ act. This amounts to an allegation of unlawful intent.”

United States v. Altman 8 Fed. Supp. 880  
at 884.

\* \* \* “and it is also generally held that words which import an exercise of the will, such as ‘feloniously’ and ‘unlawfully’ will supply the place of the word ‘wilfully’.”

Howenstine vs. United States 263 Fed. 1 at  
p. 4.

\* \* \* “Where the facts alleged necessarily import wilfulness, the failure to use the word is not fatal to the indictment.” (Underscoring ours)

Van Gesner v. United States 153 Fed. 46.

Additional authorities will be marshalled to support the motion and will be supplied as speedily as they can be collated but counsel warns that if additional authorities are discovered after the expira-

tion of the "five days before October 22nd, 1945, they will, nevertheless, be brought to the Court's attention as speedily as possible. There may well be other elements found to be missing from the indictment which are requisite and fundamental elementary allegations requisite to plead a felony upon which the defendant stands convicted.

Counsel is now continuing the diligent pursuit of a number of inquiries and his research will require several days, but he will, of course, not cite nor produce additional authorities unless he be convinced in his own mind that such authorities will enable the Court to more thoroughly analyze and thereby correctly rule upon the validity of this indictment [8] which attempted to plead a felony under the statute herein involved.

Respectfully submitted,

PEARCE, CAMPBELL, BRYAN  
& NORCOP

By MAURICE NORCOP

Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1945. [9]

At a stated term, to-wit: The October Term, A.D. 1945, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno on Tuesday the 23rd day of October in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Campbell E. Beaumont,  
District Judge

[Title of Cause.]

This cause coming on for (1) further hearing on motion in arrest of judgment and (2) hearing report of the Probation Officer and for sentence of defendant Kenton George Schultz; Mildred L. Kluckhohn, Assistant U. S. Attorney, appearing as counsel for the Government; Maurice Norcop, Esq., appearing as counsel for the said defendant, who is present in custody;

Counsel argue further re (1) motion in arrest of judgment and it is ordered that the said motion is denied and exception allowed.

Attorney Norcop states there is no legal cause why sentence should not be pronounced at this time and argues on defendant's behalf. The Court pronounces judgment as follows: [10]

District Court of the United States, Southern  
District of California, Northern Division

No. 2624

Criminal Indictment in two counts for violation of  
U.S.C., Title 50 (Appendix) secs. 311.

UNITED STATES

v.

KENTON GEORGE SCHULTZ

### JUDGMENT AND COMMITMENT

On this 23rd day of October, 1945, came the United States Attorney, and the defendant Kenton George Schultz, by Maurice Norcop, Esq., his attorney, appearing in proper person, and

The defendant having been convicted on jury's verdict of guilty on Count 2 and the offenses charged and, in the indictment in the above-entitled cause, to wit: failure to keep local draft board advised of the address where mail would reach him, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of eighteen (18) months.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) C. E. BEAUMONT,  
United States District Judge.

The Court recommends commitment to the federal road camp at Tucson, Ariz.

[Endorsed]: Filed Oct. 23, 1945. [11]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS

Name and Address of Appellant: Kenton George Schultz, County Jail, Fresno, California.

Name and Address of Appellant's Attorneys: Pearce, Campbell, Bryan & Norcop, By Maurice Norcop, Esq., 1010 Pershing Square Building, 448 South Hill Street, Los Angeles, California.

Offense: Knowing failure to keep Local Draft Board advised of Address where communication would reach him. [12]

Date of Judgment: October 23, 1945;

Brief Description of Judgment or Sentence: Sentence of imprisonment for a term of eighteen (18) months in an institution to be designated by the Attorney General of the United States with

the recommendation that the sentence be executed by placement in the Federal Road Camp at Tucson, Arizona.

Name of Prison Where Now Confined: County Jail, Fresno, California.

I, Kenton George Schultz, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the judgment above-mentioned on the grounds set forth below.

(Signed) KENTON GEORGE SCHULTZ  
(Appellant)

Dated: October 25th, 1945.

#### GROUND'S ON APPEAL

That the Second (2nd) Count of the Indictment upon which I was actually tried and convicted does not state facts therein sufficient to constitute a felony or any crime against the United States.

Respectfully filed and submitted:

(Signed) MAURICE NORCOP

Dated: October 25th, 1945.

[Endorsed]: Filed Oct. 26, 1945.

[Title of District Court and Cause.]

## ASSIGNMENT OF ERRORS

### I.

The Motion in Arrest of Judgment should have been granted and allowed. The second count of the Indictment on which the defendant was tried and convicted fails to state an offense.

### II.

The District Court erred in its opinion, decision and determination in denying the Motion in Arrest of Judgment.

Dated January 10, 1946.

Respectfully submitted,

MAURICE NORCOP

Attorney for Defendant.

[Endorsed]: Filed Jan. 11, 1946.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive contain full, true and correct copies of Indictment; Portions of Minute Orders entered October 9th, 1945 and October 10th, 1945 respectively; Motion in Arrest of Judgment; Minute Order Entered October 23, 1945; Judgment and Commitment Notices of Appeal; Motion for Order Extending Time to File Bill of Ex-

ceptions and Assignment of Errors and Order Granting Same and Order Approving Transcript of Record without Bill of Exceptions which, together with Original Assignment of Errors, transmitted herewith constitute the record on appeal to the United Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$5.95 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 16 day of January, 1946.

(Seal) EDMUND L. SMITH

Clerk

By THEODORE HOCKE

Chief Deputy Clerk

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[Endorsed]: No. 11171. United States Circuit Court of Appeals for the Ninth Circuit. Kenton George Schultz, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed January 19, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11171

KENTON GEORGE SCHULTZ,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

STATEMENT OF MATTERS UPON WHICH  
APPELLANT INTENDS TO RELY AND  
STIPULATION AS TO RECORD.

Comes now the above named appellant, Kenton George Schultz, and states that he will rely upon all motions and points of law as set forth in the same, and on the assignment of errors, and hereby adopts as his respective points to be relied upon in this appeal all those set forth in the assignment of errors heretofore prepared and filed by him.

Dated January 10, 1946.

MAURICE NORCOP

Attorney for Appellant.

[Endorsed]: Filed January 10, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Government of the United States, through United States Attorney Charles H. Carr, by Mildred Kluckhohn, Assistant United States Attorney, and Kenton George Schultz through his attorney, Maurice Norcop, that foregoing record will be the complete record necessary for the consideration of the appeal for both sides.

Dated January 10, 1946.

MILDRED L. KLUCKHOHN

Attorney for Appellee.

MAURICE NORCOP

Attorney for Appellant

Received copy of the within this 10 day of January, 1946.

CHARLES H. CARR,

United States Atty.

By MILDRED L. KLUCKHOHN

[Endorsed]: Filed January 10, 1946. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED  
ON, AND DESIGNATION OF THE RECORD

Comes now the above named Appellant, Kenton George Schultz, and hereby requests the Clerk of

the above entitled Court to have included in the transcript of the record of the following papers:

1. The Indictment;
2. Motion in Arrest of Judgment;
3. Minutes of the Court Relating to the Hearing on the Motion in Arrest of Judgment together with the Ruling of the Court in Denying the Motion;
4. Judgment and Sentence;
5. Notice of Appeal;
6. Assignment of Errors
7. This Statement of Points to be Relied on, and Designation of the Record and Stipulation.

The above named Appellant further states that it is his intention to rely on each and every Point set forth in all the Assignment of Errors.

Dated January 10, 1946.

MAURICE NORCOP

Attorney for Appellant.

Received copy of the within this 10th day of January, 1946.

CHARLES H. CARR

United States Attorney

By MILDRED L. KLUCKHOHN

[Endorsed]: Filed January 19, 1946, Paul P. O'Brien, Clerk.